***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

371A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,688

---

UNITED STATES OF AMERICA

*v.*

MELVIN TELFAIRE, APPELLANT

---

Appeal from the United States District Court
for the District of Columbia

---

# BRIEF FOR APPELLANT

---



Robert M. Beckman
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036
Counsel for Appellant
(Appointed by this Court)

## INDEX



## TABLE OF CITATIONS

## TABLE OF CITATIONS (Cont'd)



* Cases or authorities chiefly relied upon are marked by asterisks.

## STATEMENT OF QUESTIONS INVOLVED

1. Whether the trial court erred in failing to instruct the jury fully on the issue of identification.

2. Whether, under the circumstances of this case, the wholly uncorroborated testimony of the complaining witness regarding both the occurrence of the offense and the identification of the defendant constituted sufficient evidence on which to base a conviction of robbery.

3. Whether the trial court erred in refusing to instruct the jury that it could consider evidence of absence of flight or concealment as tending to prove the defendant's lack of consciousness of guilt.

## REFERENCES TO RULINGS

None

This case has not previously been before this court.

## STATEMENT OF THE CASE

This is an appeal from a conviction of robbery. The defendant, an 18-year-old boy, was sentenced to serve an indeterminate period under the Federal Youth Corrections Act.

The prosecution presented only two witnesses, the complaining witness and one of the arresting police officers. The evidence that a robbery was committed and that the defendant was involved consists solely of the testimony of the complaining witness, Mr. Peregory. At the time of the incident, Mr. Peregory was employed as a printer for the Good News Mission in Arlington, Virginia. Prior thereto, he had been an inmate of the jail in Upper Marlboro. (Tr. 5-7)

According to his testimony, Mr. Peregory was in the District of Columbia on the evening of April 10, 1970, for some unspecified purpose, and desired, while in town, to try to locate a friend with whom he and his wife had lived at one time. Pursuant to this objective, he "walked up 10th Street and looked around in this hotel."[1/] (Tr. 7) While standing there, a man and a woman approached him to inquire if he was looking for narcotics. According to the complaining witness, he denied that he was and told them he was looking for his friend, Edwards. The man and woman stated that they knew that Edwards had a room in the Warren Hotel and, although they were both apparently total strangers to him, Mr. Peregory went with them to the

---

1/ The complaining witness' friend, one Edwards, had resided at 16th and Irving Streets. (Tr. 11). It was never explained why the search for Edwards should have been conducted on downtown 10th Street. Mr. Peregory did not find Mr. Edwards between the time of the alleged offense and the date of the trial. (Tr. 11)

third floor of the hotel. (Tr. 7). The area was "not well lighted" (Tr. 12) and the rooms on that floor were vacant.

The complaining witness went on to testify that, upon arriving at the third floor of the Warren Hotel, he and his two companions were joined by a person whom he identified as the defendant. The complaining witness was then asked for a dollar, which he gave to the defendant. He was asked for more money and denied that he had any. At that point, according to his testimony, his pockets were searched and a ten dollar bill removed by the defendant. Mr. Peregory testified that he was scared, but that there "wasn't any violence at all." (Tr. 9-10). Nor was there testimony of any use of weapons or threats of bodily harm directed at him, merely a request for money and a search of his pockets.

The complaining witness then left the hotel. Approximately half an hour elapsed before he reported the incident to a uniformed policemen at 10th Street and New York Avenue, two blocks from the hotel. (Tr. 13). While he was speaking to the uniformed policeman, two plainclothes police officers arrived, and the complaining witness discussed the incident with them. The complaining witness gave the police officers "a very vague description." (Tr. 28). They then accompanied the complaining witness on a brief drive for several blocks up and down 10th Street before going to the Warren Hotel. (Tr. 14).

Upon arriving at the hotel, the complaining witness identified the defendant, who was standing in the lobby, as one of the persons who robbed him. The defendant was then placed under arrest by the police officers. (Tr. 23). At the time of his arrest, the defendant had four or five dollar bills and 60 or 70 cents in change. (Tr. 26).

From the time the plainclothes officers joined the complaining witness until the time of the arrest, approximately 20 or 30 minutes elapsed. (Tr. 28). At no time, either before or after the defendant's arrest, did the complaining witness provide the police officers with a description of the defendant's appearance, clothing or anything else about him other than that he was a Negro male. (Tr. 13-14, 28-29).

At the conclusion of the prosecution's case, which consisted solely of the testimony of the complaining witness and one of the arresting officers, the defendant moved for a judgment of acquittal, relying on the exceptionally weak and uncorroborated evidence identifying the defendant, the defendant's absence of flight during the period of approximately one hour from the time of the incident until the arrest, and the fact that, upon arrest, the defendant did not have in his possession the ten dollar bill taken from the complaining witness. The motion was denied. (Tr. 32-35).

The defendant testified that he had spent the afternoon of April 10 visiting some friends, playing pool, and then playing basketball at the John F. Kennedy playground. (Tr. 40, 46-47). He left the playground at about 7 o'clock in the evening and went to the Warren Hotel to visit a friend named Rufus or Reuben Jones (known to the defendant by the nickname "Virginia"). Mr. Jones had a room on the fourth floor of the Warren Hotel, and the defendant spent the following hour in his room talking with him and reading the paper. (Tr. 37). The defendant then left Mr. Jones' room and went down to the lobby, where he spent a few minutes talking with a young woman who had just come into the hotel. Then the hotel door bell rang and the police officers entered, went over to the defendant, informed him that

he had been identified as having been involved in a robbery, and arrested him. (Tr. 37-38).

The defendant testified that he had not robbed the complaining witness and that, indeed, he had never seen him prior to the trial. (Tr. 38). As for the money the defendant had on him at the time of his arrest, he explained that a week earlier his sister had given him eight dollars, which he had hidden underneath the rug in his room. (Tr. 39-40, 49). On the date of his arrest, he had seven dollars left, which he took with him and some of which he spent playing pool that afternoon.

At the conclusion of the defendant's testimony, defense counsel renewed the motion for a judgment of acquittal, which was again denied. Defense counsel then submitted requested instructions to the jury, including the following one, which is pertinent on this appeal, relating to the defendant's absence of flight from the scene of the alleged offense:

> "There has been evidence that the defendant was arrested near the place of the alleged offense some minutes after the offense is alleged to have occurred. Absence of flight or concealment after a crime has been committed does not create a presumption of innocence. You may consider evidence of absence of flight or concealment, however, as tending to prove the defendant's lack of consciousness of guilt. You should consider and weigh evidence of absence of flight or concealment by the defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive."

The trial judge refused to give the requested instruction, although permitting defense counsel to argue the point to the jury. (Tr. 55).

The trial judge also gave no instruction specifically relating to the issue of the validity of the complaining witness' identification of the defendant as one of the persons involved in the incident.

## SUMMARY OF ARGUMENT

The evidence in this case left two basic issues to be decided by the jury -- whether a robbery was committed, and whether the defendant was one of its perpetrators. As to both of these issues, the prosecution's case rested upon a slender reed -- the dubious testimony of the complaining witness. Even if the evidence was sufficient to permit the case to go to the jury, the established rule in this jurisdiction today requires that such a submission be accompanied by a specific instruction focusing the jury's attention on the identification issue. This instruction is to be given whether or not requested by defense counsel. It was not given here.

Moreover, the evidence in this particular case was so weak that it should not have been submitted to the jury at all. The presence of the complaining witness at the scene of the crime was not convincingly explained by him; the evidence was too weak to support the conclusion that the requisite statutory component of "force of violence" was present in this case; the complaining witness had limited opportunity to observe the third person (identified as the defendant) who joined him on the dimly lit third floor hallway; the delay of half an hour in reporting the incident to the police was suspicious; and the defendant's casual presence in the lobby of the hotel, so openly exposed to arrest, appears highly inconsistent with the perpetration of a robbery a short time before.

While the general rule in this jurisdiction permits conviction of robbery upon the uncorroborated identification testimony of a single witness, the rule does not require that every case in which the prosecution can muster no corroborating evidence must go to the jury. Where doubt about the commission

of a crime at all is coupled with uncorroborated identification testimony and the other circumstances present in this case, a directed verdict of acquittal should be granted.

Finally, the most striking fact about this "robbery" and arrest is the defendant's presence in the lobby of the hotel, the one place where he was most exposed to arrest, despite ample opportunity to leave the hotel and insure almost certain security from arrest. Such unusual circumstances justify the defendant's requested instruction on absence of flight, and it was error for the trial judge to refuse the instruction.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN FAILING TO GIVE A SPECIFIC INSTRUCTION ON THE QUESTION OF IDENTIFICATION.

Testimony in this case raised a very substantial identification issue. The defense was alibi. The sole testimony connecting the defendant with the incident was that of the complaining witness. There were no other witnesses, nor was there any circumstantial evidence linking the defendant with the incident.[2/]

Moreover, by the complainant's own testimony, the third floor hallway in which the incident took place "was not well lighted," and the complaining witness had limited opportunity to observe the person who joined him and the other two people accompanying him on the third floor of the hotel. Moreover, he failed to give the police officers any description of his assailants prior to the time of defendant's arrest. The testimony indicates that he gave no indication of Mr. Telfaire's facial features, age, height, build, attire, or any other identifying characteristics to the police even after the arrest. Nor was he able to give a meaningful description of the other two persons involved in the incident, other than the fact that "the female was wearing a red dress, or a red coat or something like that." (Tr. 29). Neither at the time defendant was arrested, nor at trial did the complaining witness notice or recollect what he had been wearing. (Tr. 21).

Thus, apart from the fact of the complaining witness' identification of the defendant at the time of his arrest and at the trial, there is not a shred of evidence confirming the reliability of his identification. On the contrary, the evidence suggests the complainant's limited opportunity to

---

2/ Indeed, the circumstantial evidence all pointed to the defendant's innocence. See Part II, infra.

observe and limited capacity to recollect identifying characteristics. Clearly, therefore, a substantial issue was raised as to the correctness of the identification of the defendant as one of the persons involved in the incident. Indeed, the weakness of the identification was one of the principal bases for defendant's motion at the conclusion of the government's evidence for a judgment of acquittal. (Tr. 32-33). Under such circumstances, even though the defendant did not specifically request an identification instruction, such an instruction should have been included in the charge to the jury, and failure to do so constitutes plain reversible error under the decisions of this court.[3/]

This case sharply presents one of the fundamental conflicts of criminal jurisprudence -- that, on the one hand, certain crimes by their nature are likely to be committed under circumstances in which it is difficult to gather convincing evidence of guilt other than the testimony of the victim, whereas, on the other hand, the ability of an individual in stress circumstances to make reliable observations is notoriously uncertain and provides a frail reed upon which to rest the conviction and imprisonment of a citizen. Clearly, a compromise must be made between an approach which would make it impossible to obtain conviction for many criminal offenses and one which would create a substantial risk of conviction of numerous innocent persons. In this case, as discussed more fully in Part II of this brief, the surrounding circumstances are such as to create grave doubt that a robbery was even

---

3/ The judge's charge to the jury did mention in passing that it was necessary to establish that property was taken by the defendant (Tr. 66-67), but at no time did the judge single out the identification issue for the jury's consideration, and appellant believes there could be no contention here that the required identification instruction was in fact incorporated in the judge's charge. See McKenzie v. United States, 75 U.S. App.D.C. 270, 126 F.2d 533, 536 (1942).

committed, let alone that defendant was one of the culprits.

Under such circumstances, the requirement of careful instructions to the jury focusing their attention on critical aspects of the case, particularly the validity of an identification by one witness constituting the sole evidence linking the accused with the crime, becomes doubly important.

In the law in this jurisdiction it is well settled today that such an instruction is required whether or not requested by defense counsel. The line of cases leading to this conclusion begins with McKenzie v. United States, 75 U.S. App.D.C. 270, 126 F.2d 533 (1942), in which a conviction of rape and robbery was reversed because of inadequate instructions on the critical issue of identification. The court stated that "the failure to say in plain words that if the circumstances of the identification were not convincing, they should acquit, was error." (126 F.2d at 536).

In subsequent cases, however, the requirement of McKenzie regarding a specific identification instruction was limited in applicablility to circumstances in which defense counsel had specifically requested such an instruction. See e.g., Obery v. United States, 95 U.S.App.D.C. 28, 217 F.2d 860 (1955); Willis v. United States, 106 U.S.App.D.C. 211, 271 F.2d 477 (1960); Jones v. United States, 113 U.S.App.D.C. 233, 307 F.2d 190 (1962). However, the dissenting opinion of Judge Edgerton in Jones marked the beginning of the development of the current law on the question. Referring to the failure to give the kind of instruction called for by McKenzie, Judge Edgerton concluded that "the error was so plain and so prejudicial that we should notice it, pursuant to our authority under Rule 52(b) FEDERAL RULES OF CRIMINAL PROCEDURE, although it was not brought to the attention of the trial court." (307 F.2d at 193).

The requirement that defense counsel specifically request an identification instruction was overruled sub silentio in Gregory v. United States, 125 U.S.App.D.C. 140, 369 F.2d 185 (1966). In that case, the defendant was convicted on two counts of murder, two robberies, and one assault with a dangerous weapon. The conviction was reversed on a number of grounds, including the failure to give an identification instruction:

> "The instructions to the jury in this case were deficient. In spite of the fact that the only real issue presented by the evidence was the identification of the defendant, no charge on identification was given. As to both robberies, there was a division among the eye witnesses as to whether or not the defendant on trial was the bandit. Yet the jury's attention was not focused on the fact that it not only had to find beyond a reasonable doubt that the crimes had been committed as charged before the defendant could be convicted but also that beyond a reasonable doubt it was the defendant on trial who had committed them.
>
> "Without doubt, conviction of the wrong man is the greatest single injustice that can arise out of our system of criminal law. The fear that a completely innocent man may be executed or sent to the penitentiary constantly haunts not only those of us concerned with the law, but sensitive people generally. Thus the obligation to guard against this danger is obvious. An identification instruction alone will not, of course, obviate the danger. But at least it is a step in the right direction. That step should have been taken in this case." (369 F.2d at 190-191).

The issue of the need for an identification instruction again confronted this court in Macklin v. United States, 133 U.S.App.D.C. 139, 409 F.2d 174 (1969). While the conviction in Macklin was affirmed, the court, after discussing the Gregory decision, laid down a rule for future applicability to criminal trials in which identification is a major issue:

> "In Gregory there was no record that an identification charge was requested; however, the court did not decide whether the error in not giving the charge was alone sufficient for reversal, since it reversed on other grounds. We think that now, after the Supreme Court has focused on identification problems in its 1967 Wade-Gilbert-Stovall trilogy, it is even more imperative that trial courts include, as a

> matter of routine, an identification instruction. In cases where identification is a major issue the judge should not rely on defense counsel to request so important a charge. In this regard, we note that the manual CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (1966) published by the Bar Association of the District of Columbia contains a charge on mistaken identity. A charge such as this might well be given, supplemented by observations on identification evidence as discussed in Wade, Gilbert and Stovall." (emphasis supplied) (409 F.2d at 178)

In view of the emphasized language, Macklin obviously constitutes a direction to trial judges to include an identification instruction in any appropriate case, whether or not requested by defense counsel. Otherwise, the court would simply have relied on the Obery-Willis-Jones line of cases, since it has always been clear, subsequent to the McKenzie decision, that such an instruction is necessary if requested.

The affirmance of the conviction in Macklin itself was due to the fact that the trial was held before the decision of the Supreme Court in Stovall. See 409 F.2d at 177. This is confirmed by the court's subsequent decision in United States v. Washington, 134 U.S.App.D.C. 135, 413 F.2d 409 (1969), holding that the Macklin rule regarding identification instructions is prospective in application. Mr. Telfaire's trial was held on July 28, 1970, nearly a year and a half after the Macklin decision.

Finally, even if there is not an across-the-board rule requiring identification instructions without request by defense counsel, there certainly must be such a rule in cases such as the present one where the identification is wholly uncorroborated. In this connection, it is instructive to compare the evidence in the present case with that in Macklin. In Macklin, not only was there an identification by the victim, but, prior to the defendant's arrest, the victim had described his assailant to the police as being shirtless. When

arrested shortly after the crime, Macklin and his co-defendant were emerging from a playground shirtless, in the process of donning their shirts. Moreover, the police found a number of bottles of whiskey and beer, which had been taken from the victim by his assailants, in the playground from which Macklin and his co-defendant were emerging. Thus, Macklin presented a case in which there was strong surrounding circumstantial evidence linking the defendant with the offense. Failure to give an identification instruction under such circumstances is not likely to have been highly prejudicial. In the present case, on the other hand, it was essential for the judge to focus the attention of the jury on the vital identification question, since there was absolutely no other evidence linking the defendant with the crime.

## II. THERE WAS INSUFFICIENT EVIDENCE EITHER THAT A ROBBERY HAD BEEN COMMITTED OR THAT THE DEFENDANT WAS INVOLVED TO PERMIT THE CASE TO GO TO THE JURY.

A paramount concern of our system of criminal justice is to avoid the conviction and imprisonment of innocent men. And while the jury is entrusted with the fact-finding function, there is a minimum level of proof which the prosecution must attain in order to permit submission of a case to the jury. Where the prosecution's evidence is such that reasonable men must have a reasonable doubt as to the commission of a crime or the identity of the perpetrator, the defendant must be acquitted. See, e.g., Hunt v. United States, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963); Reamer v. United States, 229 F.2d 884 (6th Cir. 1956).

The prosecution's evidence in this case is exceptionally weak, not only as to whether the defendant was one of the persons on the third floor of the Warren Hotel, but even as to whether a robbery was committed at all. In attempting to answer the latter question, the following factors must give rise to grave doubts:

(1) It is inherently incredible that the complaining witness was in fact looking for his friend Edwards, as he testified. Edward's last known address was at 16th & Irving Streets, N.W. In a city of three quarters of a million people, it strains credulity to believe that anyone would search for a long lost friend by promenading along downtown Tenth Street, several miles from the friend's previous known residence.

(2) Why did the complaining witness accompany two total strangers to the third floor of a shabby, under-populated hotel in the midst of a high-crime district? The complaining witness' story, if believed, reflects an astounding naivete and carelessness that is difficult to associate with one who has been

exposed to the seamy side of life, as the complaining witness had, to the extent of having spent time in prison. A far more plausible explanation of the complaining witness' behavior is that he accompanied these strangers (if, indeed, they existed at all) for some illicit purpose such as prostitution, or the purchase of narcotics.

(3) There was no evidence of weapons, no testimony of threats to the complaining witness' safety, and, in fact, an admission that "there wasn't any violence at all." (Tr. 10). The complainant testified that he was scared, but he did not testify to any threats or physical action by his companions that would give rise to reasonable fear. Of course, he may have been scared, and he may have been justified in such emotions under the circumstances. However, that he surrendered the money voluntarily and without reasonable basis for fear is an equally consistent hypothesis under the evidence adduced by the prosecution.

(4) The final circumstance that casts grave doubt upon the proposition that a robbery in fact occurred is the exceptional delay on the part of the complaining witness in reporting the incident to the police. By his own testimony, approximately half an hour passed between the time of the incident and the time he first approached a police officer, although this police officer was located only two blocks from the Warren Hotel. Is it credible that a wholly innocent person who had just been robbed by three total strangers should take half an hour to make up his mind to report the incident to the police? Taken together with the other unusual and suspicious circumstances, the delay strongly bolsters the hypothesis that there was no robbery at all.

In order to convict a person of robbery in the District of Columbia, the prosecution must prove that something of value has been taken from the person

or immediate actual possession of another "by force or violence" including, as is pertinent here, by putting the victim in fear. 22 D.C. Code §3202. Is there in this case enough evidence of a taking by force or violence, by putting in fear, to sustain a robbery conviction?

A review of District of Columbia robbery cases reveals relatively few in which establishment of the corpus delicti was a serious issue. Closest to the present case is Hunt v. United States, 115 U.S.App. D.C. 1, 316 F.2d 652 1963). In that case, the complainant had been subjected to the normal jostling at a bus stop. Upon boarding the bus, she discovered that her purse was missing. She dismounted at the next stop, got two policemen, and returned to the place where she had boarded the bus. There Hunt and another person were arrested. The evidence was such that the court was satisfied that Hunt had been involved in the theft of the complainant's money. However, the court reversed the robbery conviction and remanded for a new trial on the lesser offense of larceny, pointing out that the evidence was as consistent with larceny as with robbery, since the wallet might have dropped out of the complaining witness' pocketbook accidentally. In the present case, the evidence is extremely weak that money was taken from the complaining witness by force or violence and is at least as consistent with the hypothesis that no money was taken from him, that he parted with his money voluntarily, or that he was excessively timid and had no reasonable basis for being put in fear.[2/]

---

2/ Cases from other jurisdictions establish that the requisite component of fear must be caused by the conduct of the accused and not by the timidity of the victim. See Cranford v. State, 377 S.W.2d 957,959 (Tex. 1964); State v. Stephens, 186 P.2d 346, 351 (Ariz. 1947). The putting in fear must be established by evidence of acts, conduct, words or circumstances reasonably calculated to effect such a result, Peebles v. State, 134 S.W.2d 298, 299 (Tex. 1939). A taking is not robbery where a person parts with his money simply because the defendant made a demand in a rough, positive voice, with swearing, since there could not have been a reasonable apprehension of

(fn. continued on next page.)

The prosecution's evidence linking the defendant with the robbery -- if, indeed, there was a robbery -- raises equally grave doubts as those in Hunt about the propriety of the conviction. As indicated in the preceding section, the complaining witness had a limited opportunity to observe the defendant in a dimly lit hallway and, although making positive identification, was unable to describe the defendant in any particulars, even his clothing, and was able to give only the vaguest description of the other two persons involved in the incident. In addition to that, the ten dollar bill that defendant allegedly took from the complainant was not found on his person when he was arrested one hour later. Most extraordinary of all, when the complainant returned to the Warren Hotel with the police, the defendant was conveniently sitting in the lobby as though waiting to be identified and arrested. It is hard to imagine that, if the defendant had actually just perpetrated a robbery, he would calmly remain in the one place, the lobby of the hotel, that would maximize the probability of his identification and arrest.

Viewing these circumstances as a whole, appellant submits that a reasonable man must necessarily have entertained a reasonable doubt that he was the perpetrator of a robbery. The court should not permit this conviction to stand upon the weak, suspicious, and wholly uncorroborated testimony of the complaining witness, unsupported by a shred of independent evidence.

Appellant recognizes that the law in the District of Columbia permits conviction of robbery upon the uncorroborated testimony of a single witness. See Jones v. United States, 124 U.S. App. D.C. 83, 361 F.2d

---

2/ (Continued)
danger under such circumstances. Parnell v. State, 389 P.2d 370, 374 (Okl. 1964). Easley v. State, 199 S.W. 476 (Tex. 1917) was a case similar to the one at bar in that there was no actual assault or violence and, although the complainant claimed fear, she delayed disclosing the robbery, and the accused did not attempt to evade arrest. The court reversed the conviction due to insufficient evidence of fear.

537 (1966); Thompson v. United States, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951). But this does not mean that such cases must always be allowed to go to the jury. Both in Thompson and in Jones the commission of a robbery was clearly established, and identification alone was in doubt. In the present case, the complaining witness' own posture is suspicious, and there is grave doubt that a robbery was committed. The circumstances of this case, therefore, bring it much closer to the situation in sex crimes where the law of the District of Columbia clearly requires corroboration both of the corpus delicti and of the identity of the criminal. See, e.g., Coltrane v. United States, 135 U.S. App. D.C. 295, 418 F.2d 1131 (1969); Calhoun v. United States, 130 U.S. App. D.C. 266, 399 F.2d 999 (1968).

In concluding this portion of the argument, appellant directs the court's attention to the decision of the Fourth Circuit in United States v. Levi, 405 F.2d 380 (1968). That case considered specifically the problem of the propriety of a robbery conviction predicated solely on the testimony of a single witness. While the court affirmed the conviction in that case, it indicated that the trial judge should permit the case to go to the jury only where an examination of the totality of the circumstances substantiates the integrity of the identification:

> "We hold that in this circuit a district judge has the power to refuse to permit a criminal case to go to the jury even though the single eye witness testifies in positive terms as to identity, and that he should so refuse unless he is himself persuaded by the demeanor, appearance and degree of apparent certainty of the witness, and by other factors affecting the integrity of the identification, that in all probability it is correct." (405 F.2d at 383)

In other words, where conviction would rest upon the uncorroborated testimony of a single witness, discretion and caution should be exercised in determining whether to submit a case to the jury. The circumstances surrounding the instant case, however, are such that it should never have been submitted and that a directed verdict of acquittal should have been granted.

## III. THE TRIAL JUDGE SHOULD HAVE GIVEN THE REQUESTED INSTRUCTION ON ABSENCE OF FLIGHT.

Of all the facts and circumstances of this case, the one that stands out as being most inconsistent with the defendant's guilt is his presence in the lobby of the Warren Hotel when the complaining witness returned with the police officers. Appellant asks the judges of this court to cast their minds back over the numerous criminal appeals that they have heard to determine if they recollect a single instance in which a robbery defendant, sober and in full possession of his faculties, casually remained at the scene of the crime, thereby exposing himself to almost certain arrest. If the defendant were guilty of robbery, this was indeed an extraordinary way for him to behave.

At the conclusion of the trial, defendant's trial counsel requested an instruction to the jury that the absence of flight on defendant's part could be found by the jury to evidence a lack of consciousness of guilt. The final issue raised on this appeal is whether the judge was correct in denying this requested instruction.

Appellant concedes that the issue raised hereby is a novel one. Research has revealed no cases in which the issue of the propriety or necessity of an "absence of flight" instruction was raised. This circuit has never ruled on the issue. There are, of course, numerous cases dealing with the propriety of an instruction that flight may be considered as evidence of consciousness of guilt. The leading recent case in this jurisdiction is Austin v. United States, 134 U.S. App. D.C. 259, 414 F.2d 1155 (1969). The court there held that trial judges should proceed with care in using a flight instruction, and that such instructions should be carefully worded to point out the variety of innocent motives that might lead to flight.

In ruling on defense counsel's request for an instruction on absence of flight, the trial judge noted that "our Circuit Court approached this whole question of flight with a great deal of caution." (Tr. 55). Apparently, therefore, the denial of the requested instruction was predicated on the court's reading of Austin. However, it is fallacious logic to infer that the caution expressed by the Court of Appeals with respect to instructions permitting inferences of guilt from flight has equal applicability to the converse situation.

The rationale underlying Austin is the complexity of motives that could attach to flight to avoid arrest. However, the same complexity does not attach to the situation where the suspect is found at the scene of the crime although he had ample opportunity to flee and although departure from the scene would virtually have insured his safety from apprehension. Common experience tells us that defendant's conduct was inconsistent with any consciousness of guilt, which he would surely have entertained had he participated in the incident to which the complaining witness testified.[3/]

It is true, of course, that the trial judge permitted defense counsel to argue the matter of absence of flight to the jury. However, the argument by defense counsel is in no way equivalent to instruction by the judge and appellant was entitled to an instruction regarding his absence of flight, a matter clearly raised by the evidence in the case. See, e.g., Salley v. United States, 122 U.S.App. D.C. 359, 353 F.2d 897 (1965); Levine v. United States, 104 U.S.App. D.C. 281, 261 F.2d 747, 748 (1958).

---

3/ A distinction is to be drawn, in this connection, between departure from the scene of a crime and flight to avoid arrest. Appellant's requested instruction rested not upon his failure to flee when approached by the arresting officers, but upon his very presence in the hotel after the robbery had occurred and he had had ample opportunity to depart the scene. Thus, a ruling that the requested instruction should have been given in this case would by no means constitute a ruling that a defendant is entitled to such an instruction whenever he fails to resist arrest.

## CONCLUSION

WHEREFORE it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded for entry of a judgment of acquittal, or, in the alternative, for a new trial.

Respectfully submitted,

Robert M. Beckman
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Appellant
(Appointed by this Court)

## CERTIFICATE OF SERVICE

This is to certify that a copy of this brief was mailed, postage prepaid, this 21st day of January, 1971, to the United States Attorney, U.S. Court House, Constitution Avenue and John Marshall Place, N.W., Washington, D.C. 20001.

Robert M. Beckman

January 21, 1971

BRIEF AND APPENDIX FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,686

---

UNITED STATES OF AMERICA, APPELLEE

*v.*

MELVIN TELFAIRE, APPELLANT

---

Appeal from the United States District Court
for the District of Columbia

---


THOMAS A. FLANNERY,
*United States Attorney*

JOHN A. TERRY,
JOHN S. RANSOM,
BARRY WM. LEVINE,
*Assistant United States Attorneys.*


Cr. No. 873-70

## INDEX



## TABLE OF CASES

## OTHER REFERENCES



* Cases chiefly relied upon are marked by asterisks.

## ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Was the jury adequately instructed on the issue of identification when the Court instructed that if the jury did not find beyond a reasonable doubt that appellant was in fact the person who committed each of the proscribed acts constituting the crime charged, then it must acquit?

2. Was there sufficient evidence that appellant committed a robbery to permit the case to go to the jury?

3. Where the court permitted counsel to argue the competing inferences that conceivably might be drawn from the absence of flight but cautiously refused to instruct the jury on the concept, did it commit error?

* This case has not previously been before this Court.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 24,688

---

UNITED STATES OF AMERICA, APPELLEE

*v.*

MELVIN TELFAIRE, APPELLANT

---

**Appeal from the United States District Court for the District of Columbia**

---

## BRIEF FOR APPELLEE

---

## COUNTERSTATEMENT OF THE CASE

By indictment filed May 28, 1970, appellant was charged with robbery in violation of 22 D.C. Code § 2901.[1] On July 28, 1970, appellant was tried and found guilty by a jury with the Honorable Barrington D. Parker presiding. On August 28, 1970, Judge Parker sentenced ap-

---

[1] The statutory citation in the indictment reads, "Violation: 22 D.C. Code 3202 (Robbery)," whereas the text of the indictment charges appellant with simple robbery, which of course is a violation of 22 D.C. Code § 2901. This error in the citation is not assigned as error, nor is any prejudice apparent on the record. *See* Rule 7 (c), FED. R. CRIM. P.

pellant pursuant to the Federal Youth Corrections Act (18 U.S.C. § 5010 (b)). This appeal followed that judgment.

**The Government's Case**

At trial Joel Peregory, an employee at the Good News Mission,[2] testified that at approximately 8:30 p.m. (Tr. 12) on April 10, 1970, "while in town," [3] he endeavored to locate a friend [4] with whom he and his wife had lived in the past.[5] As Mr. Peregory walked up 10th Street, he was approached by a "fellow and a girl" who inquired if he "was looking for some 'cop' [*i.e., narcotics*]." He indicated that he was not but rather was trying to locate his friend, specifying his name. They stated that they knew his friend and that he had a room on the third floor of the Warren Hotel, and then they proceeded to lead him there (Tr. 7).

Upon arriving on the third floor of the hotel, Mr. Peregory observed that most of the rooms were vacant. It became apparent that his friend was not there. "Then Mr. Telfaire [appellant] appeared on the scene" (Tr. 8). Mr. Preregory found himself "surrounded" by the three

---

[2] The Good News Mission is apparently located in Arlington, Virginia. Its established purpose is to preach the gospel to inmates of jails and prisons. Mr. Peregory is engaged in the printing of biblical literature which is supplied to the penal institutions (Tr. 5-6).

[3] Mr. Peregory, who at the time of trial resided in Arlington, Virginia (Tr. 5), was visiting in the District of Columbia on April 10, 1970 (Tr. 7).

[4] Mr. Peregory's friend was identified only as "Edwards" (Tr. 11).

[5] When Mr. Peregory and his wife lived with Edwards, his home was located at "16th and Irving Street." The record does not indicate where Edwards lived on April 10, 1970. Mr. Peregory commented that he and his wife were formerely linked to the Edwards household: "When we were out in the cold, he [Edwards] took us in and gave a warm bed." Mr. Peregory lamented that he was attempting to discover Edwards' whereabouts because he had "heard he was using heroin. . . . I wanted to reach him and talk to him before he got to [*sic*] involved in it" (Tr. 11).

marauders; he "was then backed up against the wall and robbed" (Tr. 7-8). He was completely alone with the bandits and was "scared"; he "didn't know what was going to happen [to him]" (Tr. 9). They commanded him to give them his money. Appellant specifically demanded one dollar; Peregory capitulated and relinquished it to him.[6] Peregory testified, "Then he wanted more, and I told him I didn't have any more. So, then he looked for himself" (Tr. 8-9). They rifled through his pockets, and appellant took a ten-dollar bill (Tr. 8-9, 14-15, 21). After having been divested of his money, he was permitted to leave without "violence." As Mr. Peregory made his exodus, appellant Telfaire remarked in apparent mockery that if he acquired more money he should return and surrender it to him (Tr. 10).

Searching for about one-half hour for a policeman, Peregory walked to 10th Street and New York Avenue. There he encountered a uniformed policeman and advised him what had occurred (Tr. 10, 13). The policeman in turn made a telephone call, to which two plainclothes detectives responded in an unmarked car. Together with the plainclothesmen, Mr. Peregory returned[7] to the Warren Hotel and upon entering observed appellant standing in the lobby (Tr. 10, 14). Peregory immediately designated appellant[8] as one of his assailants, and the policemen promptly arrested him[9] (Tr. 10-11). Although Peregory did not give the police officers a detailed description of all

---

[6] In addition to giving appellant a one-dollar bill, Peregory also gave him "quite a bit of change" (Tr. 15).

[7] Peregory testified that they drove a "block or two" north of the Warren Hotel just prior to entering it (Tr. 14). That fact was corroborated by Plainclothesman Edwin Lawton of the Metropolitan Police, who testified that before going to the hotel they made an effort to determine "if the subjects were on the street, or had walked up the street from the hotel" (Tr. 24).

[8] When Peregory entered the lobby of the hotel with the policemen, appellant turned his back to them (Tr. 11, 25).

[9] There were approximately three men and one woman in the hotel lobby at the time Peregory identified appellant as one of the perpetrators of the crime (Tr. 17, 24-25, 43).

his assailants until after his identification of appellant[10] (Tr. 14, 18), he was able to answer appellant's rigorous cross-examination relating to the accuracy of his identification by emphatically declaring that he was "absolutely" "100% certain" that it was appellant who robbed him (Tr. 21-22).

Officer Lawton testified that appellant was searched after his arrest. Seized from him was "some money" consisting of "four or five dollars in bills and 60 or 70 cents in change" (Tr. 26).

The Government then rested (Tr. 32), and appellant's motion for judgment of acquittal was heard (Tr. 32-34) and denied (Tr. 34-35).

**The Defense**

Appellant, in presentation of his alibi defense, was his own sole witness. He testified that between 7:00 and 7:30 p.m. on the date in question he went alone to visit a friend known as "Virginia,"[11] who had a room on the fourth floor of the Warren Hotel. After sojourning for "about an hour," appellant informed Virginia that he was "going down to the pool room on 13th Street." Appellant left the room and entered the lobby of the hotel, where he met "a young lady . . . by the name of Mazy." He testified that while she sat on a stairway step, he chatted with her until the police entered and arrested him.[12] Upon being ar-

---

[10] Officer Lawton tesitfied that since there was no time to delay, Peregory was able to give him only a cursory description of the thieves prior to the identification of appellant in the lobby (Tr. 23-24, 28-29). Nevertheless, the description furnished was sufficient for Lawton to broadcast a lookout for them over the police radio (Tr. 29). At trial, however, Lawton was unable, without the benefit of his notes to refresh his recollection, to relate the descriptions in his testimony (Tr. 27-29).

[11] Appellant was not sufficiently familiar with his "friend" to know whether his actual name was Rufus Jones or Reuben Jones (Tr. 37).

[12] Appellant testified that he did not recognize Peregory at trial as accompanying the police at the time he was arrested (Tr. 38). Indeed, he said he had never seen Peregory before (Tr. 41-42).

rested, he said, he was "pressed . . . down" and "searched" (Tr. 38), and "four dollars in bills and some change" [13] was seized (Tr. 39). He explained that he obtained eight dollars from his sister a week earlier and had seven dollars the day he was arrested. Although he intended "to use . . . [his] money to go down to the Knights of Columbus," he spent a portion of the money "play[ing] some pool" (Tr. 39-40).

Having imparted that testimony, appellant rested his case. His renewed motion for judgment of acquittal was again denied (Tr. 51).

**Instructions**

The court conferred with counsel about proposed jury instructions. Appellant's trial counsel [14] requested, *inter alia*, that the court charge the jury on the "absence of flight." The proposed instruction in its drafted form was as follows:

> There has been evidence that the defendant was arrested near the place of the alleged offense some minutes after the offense is alleged to have occurred. Absence of flight . . . after a crime has been committed does not create a presumption of innocense [*sic*]. You may consider evidence of absence of flight . . . however, as tending to prove the defendant's lack of consciousness of guilt. You should consider and weigh evidence of absence of flight . . . by the defendant in connection with all the other evidence in the case and give it such weight as in your judgment it is fairly entitled to receive.

The court heard argument on the proposed instruction and then, noting that this Circuit has approached the "whole question of flight" with circumspection, concluded that it should not be given. However, the court ruled that counsel would be permitted to argue the concept to the jury (Tr. 51-55).

---

[13] Appellant accounted for his abundance of "change" by playing pool for "nickels, dimes and quarters" (Tr. 41).

[14] Appellant's trial counsel does not represent him on appeal.

Significantly, with respect to the first issue raised on this appeal, no instruction was requested on identification.[15] At the conclusion of the instructions both counsel indicated that they had "nothing further" (Tr. 70).

## ARGUMENT

### I. Having instructed the jury that it must acquit appellant if it did not find that *he* committed each of the elements of the crime charged in the indictment, the court properly treated the instruction on identification.

(Tr. 21-22, 64-65, 68-69)

In appellant's initial assignment of error he contends that the court erroneously failed to instruct the jury that, before it could return a verdict of guilty, it must be satisfied beyond a reasonable doubt that appellant was in fact the perpetrator of the crime charged. On this record we see no reversible error.

A cursory inspection of the transcript would reveal that each time the court defined an element of the crime of robbery to the jury, it made specific reference to the fact that the jury must conclude that the defendant, Melvin Telfaire, committed the precise act that constituted the elements before a guilty verdict could be returned (Tr. 64-65). Moreover, in the court's instruction on alibi, it charged that unless the jury found beyond a reasonable doubt that the defendant was present at the time and place the crime was committed, it must acquit (Tr. 68-69). With those instructions as given the jury was fairly informed that as a prerequisite to a guilty verdict it must find that appellant was in fact the culprit who committed the proscribed acts. *Jones* v. *United States*, 124 U.S. App. D.C. 83, 361 F.2d 537 (1966). The record is plain and decisive; Peregory was "absolutely" "100% certain" (Tr. 21-22) that appellant was one of the brigands. There is no ground for reversal here.

---

[15] The instructions relevant to the issue of identification are set forth in the appendix, *infra*, pp. 11-16.

**II. The court properly denied appellant's motion for judgment of acquittal.**

(Tr. 5-35)

Appellant further asserts that it was error for the court to deny his motion for judgment of acquittal, contending that the Government's evidence was insufficient to prove the crime of robbery. The record belies his contention.

Mr. Peregory testified that he was alone on the third floor of the Warren Hotel with appellant and his two cohorts who "surrounded" him, "backed [him] up against the wall" and relieved him of his money (Tr. 7-8). Although there was no "violence" as the term was understood by Peregory,[16] it was under the aura of duress, while being detained by the bandits, that his money was expropriated. His pockets were searched and his money seized manifestly against his will. On that testimony the court properly denied appellant's motion for judgment of acquittal. *United States* v. *Wells*, D.C. Cir. No. 23,826, decided February 10, 1971, slip op. at 1 n.1 (unpublished); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Jones* v. *United States*, 124 U.S. App. D.C. 83, 85, 361 F.2d 537, 539 (1966); *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 230 F.2d 220 (1956); *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

**III. The court properly refused to instruct the jury on the absence of flight but judiciously permitted counsel to argue the notion to the jury.**

(Tr. 51-55)

Appellant's final challenge is that the court erroneously refused to instruct the jury in accordance with appellant's proposal that the jury might infer from his *absence*

---

[16] Mr. Peregory testified that, while the crime was being perpetrated, he was "scared [and] . . . didn't know what was going to happen [to him]" (Tr. 9).

of flight his *lack* of consciousness of guilt. Appellant concedes that his supposition is novel and is unable to buttress it with judicial authority (Brief for appellant at 18). In our judgment the court properly refused to instruct the jury as requested.

Flight, an affirmative act, is somewhat ambiguous,[17] and that ambiguous quality accounts for this Court's admonition that the flight instruction be "used sparsely." *Austin* v. *United States*, 134 U.S. App. D.C. 259, 261, 414 F.2d 1155, 1157 (1969). The absence of flight, a non-affirmative act, or rather, a non-act, is at best so ambiguous that it is wholly without probative value. Concomitant with the absence of flight is the absence of a nexus from which the jury could draw *any* inference to aid in its contemplation. In ruminating on the request for the instruction, the trial judge was in all likelihood of the persuasion that appellant's lack of flight had no bearing on his consciousness or lack of consciousness of guilt. For example, appellant may have fled and then, having determined that his crime would go undetected, returned to the hotel.[18] Conceivably, appellant may have believed that he so intimidated his victim that he would not report the robbery in fear of further retribution at appellant's hands. Perhaps he remained to continue his insidious and pernicious scheme on other unsuspecting prey. There could have been many explanations for appellant's lack of flight, but the mere fact of non-flight is probative of nothing. The court in its discretion properly deemed the proposed instruction unsuitable to deliver to the jury. *See Burgess* v. *United States*, D.C. Cir. No. 21,745, decided December 29, 1970, slip op. at 13-15. The court

---

[17] The flight instruction is viewed with judicial disfavor. The courts "have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." *Wong Sun* v. *United States*, 371 U.S. 471, 483 n.10 (1963).

[18] More than one hour elapsed between the time the crime was committed and the time Mr. Peregory returned to the scene with the police officers to make his on-the-scene identification (Tr. 13).

did permit counsel for appellant to argue the notion to the jury in his summation. *Burgess* v. *United States*, *supra*, slip op. at 15-17. Beyond this the court was under no obligation to go.

Alternatively, we submit that even if this Court were to accord absence of flight and flight co-equal probity, the trial court did not err in denying the proposed instruction in its drafted form. The instruction was obviously conceived to be the inverse of the flight instruction and patterned in the format of the "red book" instruction.[19] However, not only did it not include the modification required by *Austin*,[20] but it also did not contain language which would tell the jury that it was "not required [to make the inference]."[21] The instruction being inherently defective, it cannot be said that it was error not to give it.

---

[19] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 27 (1966).

[20] Noting that an innocent man might respond (flee) in a manner similar to that of a guilty man for a variety of reasons, this Court has stated that the flight instruction, when used, "should be accompanied by a fuller explanation by the judge of the variety of motives which might prompt flight, and thus of the caution which a jury should use before making the inference of guilt from the fact of flight." *Austin* v. *United States*, *supra*, 134 U.S. App. D.C. at 261, 414 F.2d at 1157. The absence-of-flight instruction as formulated by appellant did not state that a guilty person might respond in a manner similar to that of an innocent man for reasons perhaps known only to himself.

[21] See note 19, *supra*. Instruction No. 27 contains such language.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
*United States Attorney.*

JOHN A. TERRY,
JOHN S. RANSOM,
BARRY WM. LEVINE,
*Assistant United States Attorneys.*

# APPENDIX

## APPENDIX

The instructions relevant to this appeal are as follows:

> In determining whether the Government has established the charge against the defendant beyond a reasonable doubt, you must consider and weigh the testimony of all of the witnesses who have appeared before you.
>
> You are the sole judges of the credibility of the witnesses. In other words, you alone are to determine whether to believe any witness and the extent to which any witness should be believed. If there is any conflict in the testimony, it is your function to resolve the conflict and to determine where the truth lies.
>
> In reaching a conclusion as to the credibility of any witness, and in weighing the testimony of any witness, you may consider any matters that may have a bearing on the subject. You may consider the demeanor and the behavior of the witness on the witness stand; the witness' manner of testifying; whether the witness impresses you as a truthful individual; whether the witness impresses you as having an accurate memory and recollection; whether the witness has any motive for not telling the truth; whether the witness has full opportunity to observe the matters concerning which he has testified; whether the witness has any interest in the outcome of this case, or any friendship or animosity toward any persons concerned in this case.
>
> You may consider the reasonableness or the unreasonableness, the probability or improbability, of the testimony of a witness in determining whether to accept it as true and accurate. You may consider whether he has been contradicted or corroborated by other credible evidence.
>
> If you believe any witness has shown himself to be biased or prejudiced, either for or against either

side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of such witness so as to affect the desire and capability of that witness to tell the truth.

You should give the testimony of each witness such weight as in your judgment it is fairly entitled to receive.

If you believe any witness has willfully testified falsely with respect to any material fact about which the witness could not reasonably be mistaken, then you may, if you deem it fit to do so, disregard all or any part of the testimony of that witness, or you may accept such portion of his testimony as you may find worthy of belief.

In this indictment the defendant Melvin Telfaire has been charged with robbery. The indictment reads as follows:

"On or about April 10th, 1970, within the District of Columbia, Melvin Telfaire, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Joel E. Peregory, property of Joel E. Peregory, of the value of about $10.00, consisting of $10.00 in money."

What is robbery? Robbery is defined very simple in our District of Columbia Code and because the definition is very brief, I shall read it to you:

"Whoever, by force or violence, whether against resistance, or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another, anything of value is guilty of robbery."

In order for you to find the defendant, Melvin Telfaire guilty of robbery, you must find that the Government has proved beyond a reasonable doubt the following:

That the defendant took property of some value from the complainant, Mr. Peregory, against the will of the complainant;

That the defendant took possession of such property by force or violence of [*sic*] stealthy seizure, snatching, or putting the complainant in fear;

That the defendant took possession of such property from the person or immediate actual possession of the complainant;

That, after having so taken the property, the defendant carried it away; and

That the defendant took such property and carried it away without the right to do so and with the specific intent to steal it.

To establish the first essential element of the offense, it is necessary that there have been such a taking that the defendant acquired possession of the property, enabling him to exercise actual control over it.

It is necessary that the property, the possession of which was taken, have had some value at the time of the taking. In this case there was testimony that it was money, so there is a value.

It is also necessary that the taking of possession of the property have been made against the will of the complainant. The offense is not committed where the property is taken with the full knowledge and consent of the owner, or one authorized to consent on his behalf.

It is further necessary to establish the second element of the offense as outlined to you, that the possession of such property have been taken by force or violence, whether against resistance, or by sudden or stealthy seizure or snatching, or by putting in fear.

It is not sufficient merely that the defendant acquired possession of the property. He must have acquired possession by force or violence.

If the possession was acquired by actual force or physical violence against the person of the complainant sufficient to overcome or prevent his re-

sistance, the requirement of force or violence is satisfied.

If the possession was acquired by putting the complainant in fear, without employment of actual force of physical violence against the person, the requirement of force or violence is satisfied if the transaction was attended with circumstances, such as threats by word or gesture, as in common experience are likely to create a reasonable apprehension of danger and induce a man to part with his property for the sake of his person.

If the possession was acquired by sudden or stealthy seizure or snatching, the requirement of force or violence is satisfied, if the defendant exercised sufficient force to accomplish the actual physical taking of the property from the person of the complainant, even though it was taken without the complainant's knowledge and even though the property was unattached to his person.

To establish the third element of the offense, it is necessary that the property have been taken from the person or immediate actual possession of the complainant. This means that the property must have been on the person of the complainant or within an area within which the complainant could reasonably be expected to exercise some physical control over it.

To establish the fourth essential element of the offense, it is necessary that the defendant, after having taken the property, have carried it away. However, the least removal of the thing taken from the place it was taken, satisfied the requirement of carrying away.

To establish the fifth essential element of the offense, it is necessary that the property was so taken and carried away by the defendant without right to do so and with specific intent to steal it.

There can be no robbery where the property is taken for lawful purpose. At the time of taking

and carrying the property away, the defendant must have had the specific intent to deprive the complainant of his property and to convert and appropriate it to the use and benefit of the taker.

I have used the word "specific intent." Let me define that concept for you. Intent means that a person had the purpose to do a thing; it means that he made an act of the will to do the thing; it means the thing was done consciously and voluntarily and not inadvertently or accidentally.

Some criminal offenses require only a general intent. Where this is so, and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act.

Other offenses require a specific intent. Specific intent requires more than a mere general intent to engage in certain conduct or to do certain acts. A person who knowingly does an act which the law forbids, intending with bad purpose either to disobey or disregard the law, may be found to act with specific intent.

Intent ordinarily cannot be proved directly, because there is no way of fathoming and scrutinizing the operations of the human mind. But you may infer as to the defendant's intent from the surrounding circumstances. You may consider any statement made and act done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind. You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted.

In this case the defendant has taken the stand and testified in his own defense with respect to what occurred on April 10, 1970. He admits that he was in the hotel. However, he states that he was on the fourth floor of the hotel and not on the third floor where the alleged offense took place. He denies

that at any time he robbed or even saw the complainant.

His defense is in the nature of an alibi and I wish to give you the following instruction of law with respect to an alibi. The claim of abili is legitimate, legal and proper. The defendant may not be convicted of the offense with which he is charged unless the Government proves, beyond a reasonable doubt that the defendant was present at the time when, and at the place where, the offense was committed.

If, after full and fair consideration of all of the facts and circumstances in evidence, you find that the Government has failed to prove beyond a reasonable doubt that the defendant was present at the time when, and the place where, the offense charged was allegedly committed, you must find the defendant not guilty.

As I have indicated to you with respect to the particular offense, the Government has a burden of proving all of the essential elements of the offense with which the defendant is charged beyond a reasonable doubt.

When you retire to the jury room there are two possible verdicts that may be returned.

If you find the Government has proven beyond a reasonable doubt all of the essential elements of the crime of robbery as I have defined them to you, then you may find the defendant guilty under the indictment as charged.

If, on the other hand, you find that the Government has not proven beyond a reasonable doubt all of the essential elements of the crime of robbery as I have defined to you, then your verdict must be not guilty. (Tr. 62-69.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 . 423424 611